

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE

No. 04-239

CASE NO. SC05-851

JUDGE RICHARD H. ALBRITTON, JR.

**REPLY TO THE JUDICIAL QUALIFICATIONS COMMISSION'S
MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO
COMPEL**

COMES NOW, the Honorable Richard H. Albritton, Jr., by and through his undersigned counsel and files this Reply to the Judicial Qualifications Commission's (the "JQC") Memorandum in Opposition to Respondent's Motion to Compel and sets forth the following argument:

Robert W. Butler, the investigator who conducted witness interviews and prepared the witness summaries sought by Judge Albritton, attests in his affidavit filed by Special Counsel that the summaries were provided to the Investigative Hearing Panel. (See Notice of Filing and Affidavit, attached as Exhibit A).

Indeed, based on the fact that only three witness statements were provided to Judge Albritton out of some thirty (30) witnesses expected to testify, the witness summaries must have been considered by the Investigative Panel as evidence supporting the probable cause findings for the thirty-six charges set forth in the Formal Charges. While Special Counsel does not dispute that the summaries were

used as evidence in the probable cause determination, the JQC insists that disclosure is not necessary since the summaries do not meet the technical definition of a “statement” under the Rules of Civil Procedure.

Regardless of how the word “statement” is defined in the Rules of Civil Procedure, the Florida Supreme Court has held that an “accused judge” must have **“full access to the evidence upon which formal charges are based.”** In re Inquiry Concerning a Judge re: Graziano, 696 So. 2d 744, 751-52 (Fla. 1997)(*emphasis added*). Special Counsel’s argument overlooks the central issue of whether these witness statements or summaries were actually provided to the Investigative Panel for its consideration in finding probable cause. If the witness summaries were provided to or considered by the Investigative Panel in finding probable cause, these documents must be disclosed to Judge Albritton regardless of whether they are ultimately classified as “summaries,” “statements” or other evidentiary material.

In essence, Special Counsel argues that by altering the method by which the JQC gathers testimonial evidence (*i.e.* by failing to contemporaneously record the witnesses’ statements and instead permitting the investigator to “summarize” the witnesses’ statements after the interview), it can circumvent the broad discovery rights guaranteed to an accused judge by the Court in JQC proceedings. While Special Counsel may certainly dictate the manner in which it chooses to investigate

its case, the JQC should be prohibited from choosing to submit witness summaries as evidence at the 6(b) hearing to support a probable cause finding and then subsequently claiming that these summaries should not be disclosed because they are not technically witness “statements.”

Contrary to Special Counsel’s assertions, Judge Albritton is not simply attempting to gain access to work product materials. Any witness summary provided to the Investigative Panel as evidence in the Rule 6(b) hearing lost any “work product” status that it would have held had they not been submitted to support a probable cause determination. The Florida Supreme Court has repeatedly held as follows:

Any work product privilege that existed . . . ceases once the materials or testimony are intended for trial use. More simply, if the materials are only to aid counsel in trying the case, they are work product. But if they will be used as evidence, the materials . . . cease to be work product and become subject to an adversary’s discovery.

Northup v. Acken, 865 So. 2d 1267, 1270 (Fla. 2004)(quoting Dodson v.

Persell, 390 So. 2d 704, 707 (Fla. 1980). The Court further emphasized:

[W]e reiterate our dedication today to the principle that in Florida, when a party reasonably expects or intends to utilize an item before the court at trial, for impeachment or otherwise, the video recording, document, exhibit, or other piece of evidence is fully discoverable and is not privileged work product.

Northup at 1270. In this case, the JQC's counsel made the decision to use the summaries as evidence before the Investigative Hearing Panel. As a result, the summaries could not be categorized as work product intended solely to assist counsel in their preparation for trial. Instead, the summaries are evidence that must be disclosed to Judge Albritton. See In re Graziano at 751-52; See also In re Inquiry Concerning a Judge re: Cynthia A. Holloway, 832 So. 2d 716 (Fla. 2002).¹

Respectfully submitted,

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¹ Special Counsel attempts to distinguish the Holloway order by claiming that the JQC did not provide the witness summaries following the entry of the Order. However, General Counsel Thomas MacDonald and former Special Counsel Beatrice Butchko should confirm that the witness summaries were promptly disclosed as ordered by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of December, 2005, the original of the foregoing Reply to the Judicial Qualifications Commission's Memorandum in Opposition to Respondent's Motion to Compel has been filed electronically via e-file@flcourts.org and furnished by FedEx overnight delivery to:

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with copies by U. S. Mail to:

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